

Canada Industrial Relations Board



Conseil canadien des relations industrielles

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Reasons for decision

Canadian Union of Postal Workers,

applicant,

and

Teamsters/Québec, Local 931,

bargaining agent,

and

Colispro Inc.,

employer,

and

2645-0858 Québec Inc.; 9188-6960 Québec Inc.;
9177-8837 Québec Inc.; 9173-7536 Québec Inc.;
Plani-Gestion R.B. (2006) Inc.; 9037-6740 Québec
Inc.; Binom Trans Inc.; Oltrtrans Inc.; 2849-5067
Québec Inc.; Transport Michel Gauthier Inc.; Davlin
Inc.,

interested parties.

Board File: 27855-C

Neutral Citation: 2011 CIRB 588

May 4, 2011

A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Louise Fecteau, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code* (*Part I Industrial Relations*) (the Code), must hereby rule on a preliminary objection of *res judicata*

Canada

raised by Colispro Inc. in the context of an application for certification filed by the Canadian Union of Postal Workers (the union), pursuant to section 24 of the *Code*.

The parties filed written submissions on the preliminary objection and the Board held a hearing on the issue in Montréal, Quebec, on March 17, 2011.

Appearances

Mr. Jean-François Beaudry and Ms. Katherine-Sarah Bouffard-Larouche, for the Canadian Union of Postal Workers;

Messrs. Paul A. Venne and Richard Bernèche, for Colispro Inc.

I—Facts and Background

[1] Colispro Inc., also known as Nationex, is an interprovincial transportation company that handles the delivery of different types of parcels. It does business across Canada.

[2] On December 7, 2009, the union filed an application for certification to represent a bargaining unit described as follows:

All brokers and owner/lessee operators of vehicles, party to a verbal or written contract, transporting parcels or envelopes, as well as loaders, at the St-Hubert facility of Nationex-Colispro Inc., excluding employees working at the St-Hubert facility covered by order no. 8424-U of the Canada Industrial Relations Board.

(translation)

[3] The brokers covered by the certification application include 2645-0858 Québec Inc., run by Mr. Yves Meunier. In *Yves Meunier / 2645-0858 Québec Inc.*, 2008 CIRB LD 1770, issued on March 3, 2008, the Board determined that the transportation operations of this company were federally regulated and subject to the *Code*. On April 11, 2008, the Board issued an order certifying Teamsters/Québec, Local 931 (the Teamsters), as the bargaining agent for a bargaining unit comprising “all drivers, dependent contractors of 2645-0858 Québec Inc.” (order no. 9444-U).

[4] In response to this application for certification, Nationex not only contested the fact that it was the employer of the employees covered by the application, but also raised a preliminary objection claiming *res judicata* in regard to 2645-0858 Québec Inc. and its drivers.

[5] Nationex submitted that the certification order issued by the Board on April 11, 2008, had the authority of *res judicata* as regards this company since the purpose, the cause of action and the parties in the instant matter were the same.

II—Positions of the Parties

A—Nationex

[6] Nationex points to the facts that led the Board to issue the order certifying the Teamsters as the bargaining agent of the drivers, dependent contractors of 2645-0858 Québec Inc., on April 11, 2008 (order no. 9444-U). It argues that counsel for 2645-0858 Québec Inc. admitted at the time that the company was the employer of the employees covered by the certification application filed by the Teamsters. It emphasizes that the Teamsters also made an admission, stating that, despite the close ties between Nationex and 2645-0858 Québec Inc., it was in fact the latter that dismissed, disciplined and paid the employees and performed day-to-day oversight of the work.

[7] Nationex alleges that no legal or factual changes have occurred since the Board issued its order in favour of the Teamsters on April 11, 2008. It accordingly submits that 2645-0858 Québec Inc. continues to be the employer of the drivers, dependent contractors covered by the application for certification filed by the union.

[8] Nationex further alleges that the Board cannot amend the order it issued on April 11, 2008, since, in its view, this would be tantamount to reconsidering the order even though there are no new facts warranting such action and none of the criteria for reconsideration have been met.

[9] Nationex filed several Board decisions relating to the Board's reconsideration power and the doctrine of *res judicata*.

[10] With respect to *res judicata*, counsel for Nationex alleges that the three criteria developed in civil law jurisprudence are met in this case, that is, the purpose, the cause of action and the parties are the same. Counsel cites authors Jean-Claude Royer and Léo Ducharme and several civil law court decisions in this regard. Counsel submits that, although other parties are covered by the certification application in this matter, the parties are the same in the context of the relationship between the employees of 2645-0858 Québec Inc. and their employer. He alleges that the purpose in this matter is exactly the same as in the matter decided in 2008, that is, to determine the true employer of the employees of 2645-0858 Québec Inc. He further alleges that the cause of action is also the same, since it once again concerns the contractual relationship between 2645-0858 Québec Inc. and Nationex.

[11] Thus, in Nationex's view, the parties concerned by the purpose and the cause of action are the same as in the matter that led to the order of April 11, 2008, that is, Nationex and 2645-0858 Québec Inc.

[12] With respect to the Board's reconsideration power, counsel for Nationex refers to *Ted Kies*, 2008 CIRB 413, among other things, and submits that the union has failed to put forward any of the facts or evidence set out therein that could lead the Board to amend its order of April 11, 2008. In fact, he argues that no new facts have arisen since the Board issued its order in favour of the Teamsters that would warrant amending the said order under section 18 of the *Code*. He therefore submits that 2645-0858 Québec Inc. continues to be the employer of the employees of 2645-0858 Québec Inc. and that, consequently, those employees cannot be covered by the union's application for certification.

B—The Union

[13] The union submits that *res judicata* is not applicable in this matter. It alleges that one of the three criteria that must be met in order for this principle to apply, that of the same parties, is in fact not met. It submits that the parties to the instant matter are not the same as in the matter that led to

the April 11, 2008, certification order, since the union covered by the order of April 11, 2008 (the Teamsters) is not the one covered by this matter.

[14] Additionally, the union argues that, in any event, *res judicata* is not applicable to Board decisions given the Board's reconsideration power under section 18 of the *Code*. It refers in this regard to the decision in *Bayside Port Employers Association Inc.*, 2004 CIRB 293.

[15] In the union's view, given the evolving context of labour relations, the Board is not bound by *res judicata*, since under section 18 of the *Code*, it may review, rescind, amend, alter or vary any order or decision made by it.

[16] The union also alleges that, in exercising its reconsideration power under section 18 of the *Code*, the Board is not restricted by the circumstances set out in section 44 of the *Canada Industrial Relations Board Regulations, 2001*. In this regard, it cites the recent decision in *Société des Arrimeurs de Québec v. Canadian Union of Public Employees, Local 3810*, 2008 FCA 237.

[17] The union adds that, when an application for certification such as the one before the Board is filed, the Board must consider it as an application for reconsideration of previous orders, and refers to the decision in *CITV SUB Inc.*, 2001 CIRB 134. In the union's view, the Board should review its order of April 11, 2008, in the context of the instant application for certification, to take into account the very particular circumstances of the matter now before the Board.

[18] The union submits that, although in theory 2645-0858 Québec Inc. handles the hiring, dismissal and supervision of the owner-operators, the reality is very different, with Nationex exercising "fundamental control" (translation).

[19] Further, the union submits that it is because of the economic dependence of 2645-0858 Québec Inc. on Nationex and because of Nationex's control over the work conditions and performance that the parties have failed to enter into a collective agreement.

[20] The union thus concludes that the application for certification as it relates to 2645-0858 Québec Inc. should be considered by the Board as an application for reconsideration of its order of April 11, 2008.

III—Analysis and Decision

[21] The Board must rule on the employer's preliminary objection of *res judicata* in relation to 2645-0858 Québec Inc.

[22] In *Bayside Port Employers Association Inc.*, *supra*, the Board explained that the rule of *res judicata* should be applied with circumspection. It stated the following in this regard:

[22] The Board has, however, as have other labour tribunals, applied this rule with circumspection because of the evolving context of labour relations. In the case of the Canada Industrial Relations Board, section 18 of the *Code* provides a broad and unusual exception to the rule, as applied by the courts, in that the Board has the power to review its own decisions:

18. The Board may review, rescind, amend, alter or vary any order or decision made by it and may rehear any application before making an order in respect of the application.

[23] Consequently, the Board may at any time, upon application by the parties, review the bargaining certificate. The review of a bargaining certificate works both ways. The union may apply to enlarge the certificate just as the employer may apply to modify the composition of the bargaining unit as a result, for example, of corporate changes.

[23] In that decision, the Board dismissed the preliminary objection of *res judicata* in relation to the certification order it had issued seven years earlier on the basis that the legislation that governs the Board gives it the power to review its own decisions.

[24] There is no question that parties covered by a certification order may apply to the Board for a review of the order at a future point in time. For example, under section 18 of the *Code*, the Board could amend the description of the bargaining unit to reflect or take into account the employer's expansion or restructuring. In fact, the Board does so fairly regularly. This shows that a certification order may evolve over time, depending on the labour relations environment within the company.

[25] That said, it is necessary to determine whether in this matter the Board can review its April 11, 2008, certification order or, as the union maintains, consider the application for certification as an application for reconsideration of the unit it determined on April 11, 2008.

[26] To properly analyze the union's submissions, the Board must begin by looking at the context in which it issued the certification order of April 11, 2008.

[27] The Teamsters filed the application for certification in that matter on September 26, 2007, seeking to represent "all dependent contractors" working for Yves Meunier / 2645-0858 Québec Inc.

[28] 2645-0858 Québec Inc. initially challenged the Board's constitutional jurisdiction, submitting that its operations were strictly provincial transportation operations. The Teamsters disputed the position taken by 2645-0858 Québec Inc., pointing out that the latter's operations were exclusive to a company subject to the *Code*, Nationex.

[29] The Board held a hearing on the constitutional jurisdiction issue and determined that the operations of 2645-0858 Québec Inc. were in fact integral to Nationex's interprovincial transportation operations. It accordingly concluded that the Teamsters' application for certification fell within its jurisdiction.

[30] 2645-0858 Québec Inc. subsequently submitted to the Board that it was not the employer of the employees covered by the application for certification, that its undertaking was also a dependent contractor within the meaning of the *Code* and that the true employer was Nationex.

[31] The Board therefore sought submissions from Nationex on the issue of the true employer and in fact granted it interested party status in the matter. Shortly thereafter, on March 18, 2008, counsel for 2645-0858 Québec Inc. informed the Board that it was withdrawing the letter in which it had alleged that it was not the employer of the employees covered by the certification application. It indicated afterwards that its client actually had full control over the hiring and dismissal of all its drivers and could take back or change their routes at any time. It also pointed out that the work was supervised entirely by its client, which was solely responsible for reprimanding drivers or imposing

disciplinary action. It added that its client also controlled the drivers' remuneration and oversaw any overtime work.

[32] The Teamsters, which had filed the application for certification in that matter, then provided the following confirmation on March 26, 2008:

While it is true, according to the file, that there are close ties between Colispro Inc. and 2645-0858 Québec Inc., according to our information, the latter is responsible for hiring, dismissals, discipline, remuneration and day-to-day oversight of the work.

(translation)

[33] In light of all the above submissions, the Board, on April 11, 2008, issued order no. 9444-U certifying the Teamsters as the bargaining agent for a bargaining unit comprising all drivers, dependent contractors of 2645-0858 Québec Inc.

[34] In the matter now before the Board, as pointed out by Nationex in its submissions, there is nothing in the evidence to show that any legal or factual changes have occurred in the relations between 2645-0858 Québec Inc. and its drivers, dependent contractors, since the Board issued the order of April 11, 2008. The union did not produce any evidence in this regard.

[35] It is true that, under section 18 of the *Code*, the Board may review a certification order on the basis of new facts and changes in the specific labour relations environment. However, the instant application by the union is more or less equivalent to an application for revocation of a judgment by a third party rather than an application for review. Indeed, the union was not a party to the original certification matter and consequently is not in a position to comment on the factual situation that led the Board to issue its April 11, 2008, certification order.

[36] In its reply, the union states that the Board was somewhat misinformed by the parties and that "during the investigation that led to order no. 9444-U being issued, the parties failed to produce in evidence all of the facts relevant to the determination of economic dependence" (translation). However, in its oral arguments, the union did not raise the existence of any new facts that would warrant the Board reconsidering its decision and finding that the drivers, dependent contractors of

2645-0858 Québec Inc. now have a new employer. In 2008, the company itself indicated that it was the employer of those employees. And contrary to the union, that company was a party to the matter. Yet that company never asked the Board to review the certification order that had determined its employer status. The same holds true for the Teamsters, the bargaining agent concerned by that determination. The union's position is thus as extraordinary as a third party alleging that a woman could not legitimately have claimed some years before to be the mother of her child.

[37] The union did not argue that 2645-0858 Québec Inc. should no longer be considered as the employer of the employees concerned as a result of a sale of business, a transfer of assets or any kind of shutdown of operations.

[38] In *Aramark Québec Inc.*, 2001 CIRB 123, the Board had before it an application similar in some respects to the one now before it. The United Steelworkers of America, Local 7065 (the Steelworkers) had filed with the Board an application for a declaration of sale of business pursuant to section 44 of the *Code* and challenged the identity of the employer indicated in a certification order issued by the Board many years earlier. The employer covered by the application was a railway company that had in the past provided food services. The company had stopped performing those services, contracting them out instead. The Board had issued an order certifying the Steelworkers as the bargaining agent of the subcontractor's employees. Several years later, the railway company decided to enter into a contract with a different subcontractor for the same food services. The Steelworkers sought recognition of successor rights, alleging that the railway company had in fact always been the true employer of the first subcontractor's employees. A majority of the Board dismissed the Steelworkers' application, stating the following regarding the determination of the true employer:

[26] There is no doubt that all of those alleged facts challenge the Board's previous decisions and raise facts that not only have never been presented before, but that would entail a reopening of the Board's inquiry. The applicant asks that those decisions be remedied by denying them and by re-establishing that QNS&L has always been the employer. It is the Board's view that such a request would mean, for all practical purposes, an application for revocation and accordingly an application for reconsideration of four previous Board decisions.

...

[28] In light of those criteria, the Board does not see how the problem of the employer's identity could not have been foreseen thus far or could not have been dealt with satisfactorily at the time of the 1983

order or the joint application by the parties of July 20, 1991 to change the name of the employer from Crawley to Sodexho. The facts raised in the instant application are not new and the applicant has not raised any reasons that would enlighten the Board on how those facts or considerations could have resulted in different orders at the time when they were made. ...

[39] The Board comes to the same conclusions in the matter now before it, especially given that, in the matter under review, the union was never a party to the certification matter that led to the Board's order of April 11, 2008.

[40] Furthermore, the Board has already made it clear on several occasions that its reconsideration power under section 18 of the *Code* is not a means of rearguing the same issues when a party is not satisfied with a decision (see *National Bank of Canada, Jonquière-Kénogami* (1991), 85 di 186 (CLRB no. 882)). Also, as set out in section 22 of the *Code*, every order or decision of the Board is final.

[41] The Board certainly cannot amend or rescind the certification order it issued on April 11, 2008, at the request of another union that was not a party to the matter of the certification application filed on September 26, 2007, but that now finds that it is dissatisfied with the order issued.

[42] For all of the reasons cited above, the Board finds that it cannot review the certification order of April 11, 2008, and declares that the drivers, dependent contractors of 2645-0858 Québec Inc. cannot be covered by the application for certification filed by the union on December 7, 2009, since their true employer has already been determined.

[43] The Board does wish to point out, however, that the order issued by it on April 11, 2008, did not rule on the relationship of dependency that might exist between Mr. Yves Meunier, President of 2645-0858 Québec Inc., and Nationex, based on it being shown that Mr. Meunier is an employer who nonetheless is a dependent contractor of Nationex.

***Certified Translation
Communications***

Louise Fecteau
Vice-Chairperson